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No. 82-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOMEWOOD CITY BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

JEAN AVERY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT, JEAN AVERY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in adhering to the rule of *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, that where a public employee has proved that an unconstitutional consideration was a motivating factor in her discharge, the burden is on the employer to show by a preponderance of the evidence that the employee would have been discharged for lawful reasons even in the absence of the employer's unlawful motivation.

2. Whether the court of appeals correctly determined that because there was no evidence in the record to support a finding that respondent would have been discharged in the absence of the unlawful policy that motivated petitioners to discharge her, and consequently any finding that petitioners had satisfied their burden of proof under *Mt. Healthy* would be clearly erroneous, judgment should be entered for respondent.

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BRIEF FOR RESPONDENT, JEAN AVERY IN OPPOSITION

STATEMENT OF THE CASE

In February 1977 respondent Jean Avery, a tenured teacher, was discharged by petitioners, the Board of Education and Superintendent of Schools of Homewood City, Alabama. She had taught since 1972 at Shades Cahaba Elementary School in the Homewood City school system. Respondent was by all accounts an excellent teacher, and apart from the events that led to her discharge she had occasioned no dissatisfaction on the part of the school system.

The Board had a written policy providing that teachers who became pregnant were to inform the Superintendent of their pregnancy four months prior to the expected date of delivery. In mid-November 1976, respondent, who was not married, informed her principal that she was pregnant and that her expected delivery date was in late December 1976. (Respondent testified at trial that she

had forgotten the four-month-notice policy, and had not willfully delayed her notice of pregnancy.) Notice of the pregnancy was transmitted to petitioner George French, the Superintendent of Schools. French then met with respondent and urged her to resign because of the "moral problem" of having a child out of wedlock. (Tr. 156).[1] When respondent chose not to resign, the Board, acting on Superintendent French's recommendation, directed that she be suspended, pending a hearing as to whether the Board would adopt French's proposal that she be discharged.

The day after the Board's action, French sent respondent a letter listing three charges which formed the basis of his recommendation that she be discharged: "insubordination," "neglect of duty," and "immorality." French testified at trial that the first two charges referred to respondent's failure to give timely notice of her pregnancy, and that the third charge referred to the fact that she was due to have a child out of wedlock. (Tr. 54). After a hearing on these charges, the Board voted to discharge respondent.

The alleged immorality of respondent's unwed parenthood was a motivating factor in the Board's decision to discharge her. Thus, at trial the Board's attorney summarized the Board's position as follows:

> [W]hat we are saying, it is a question of immorality. In other words, if the Court concludes from this testimony today that what occurred in this instance involving the plaintiff was an immoral act, the board had the perfect right to discharge her under the statutory grounds of immorality.
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> We submit it on that basis.[2]

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[1] References to "Tr." are to the trial transcript.

[2] Tr. 233. Petitioners admitted in their answer to the complaint that plaintiff was discharged at least in part for "immorality;" and in response to a request for admissions petitioners admitted

Superintendent French testified that he would have recommended respondent's discharge for the alleged immorality of her out of wedlock pregnancy, even if she had given timely notice of the pregnancy. (Tr. 68-69). On the other hand, no witness testified that respondent would have been discharged merely for having failed to give notice of her pregnancy four months before her due date, absent the alleged immorality of her unwed parenthood; and no evidence was introduced that any teacher, apart from respondent, had ever been discharged for noncompliance with the four-month-notice rule.

After a bench trial, the district court (McFadden, J.) found that one of the grounds on which respondent's employment was terminated was "immorality" (A-3),[3] and that petitioners "equate[d] an unwed pregnancy with immorality." (A-4). The district court further acknowledged that the Board's policy requiring the dismissal of all unwed parents might well be unconstitutional.[4] But the court "f[ound] it unnecessary to reach the constitutional issue," stating:

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that they "equate the single fact of being pregnant and unmarried with immorality." Superintendent French testified at trial that he made a determination that respondent was immoral solely on the basis of his religious belief that giving birth out of wedlock constitutes an immoral act (Tr. 33, 75-76), and he explained that he had developed an unwritten policy that no parent of a child born out of wedlock should work for the School Board in any position, regardless of the circumstances surrounding the pregnancy, regardless of any other facts regarding the individual's character, ability, or past performance, and regardless of whether students were likely to become aware that the individual had given birth out of wedlock. (Tr. 83-86, 88-89, 94-96).

[3] References to "A" are to the appendix to the Petition for Certiorari.

[4] *Ibid.*, citing *Andrews v. Drew Municipal Separate School Dist.*, 507 F.2d 611 (5th Cir. 1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976).

> Immorality was only one of the grounds for termination. Defendants contend that the plaintiff's employment was also terminated on the grounds of insubordination or neglect of duty in not reporting her pregnancy. Clearly she did not comply with the school rules with respect to reporting. (A-4-5).

The district court stated that because the notice rule was "reasonable," it was "unnecessary to reach the constitutional issue and the other issues raised by plaintiff" (A-5), and the court entered judgment in favor of petitioners.

The court of appeals reversed. In an opinion by Judge Tjoflat, joined by Judges Morgan and Anderson, the court of appeals accepted both of the critical findings of fact made by the district court: (i) "that the pregnancy was one of the reasons for Avery's discharge" (i.e., "a motivating factor in Avery's discharge was immorality") (A-9), and (ii) that respondent's non-compliance with the notice rule also played a part in her discharge (A-10). But the court of appeals held that in entering judgment for petitioners, the district court had "contravened the standards of proof and causation mandated by the Supreme Court for mixed-motive discharge cases such as this one." (A-8, citing *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977).)

The court explained that under *Mt. Healthy*, "[t]he burden was initially on Avery to show that her conduct was constitutionally protected and was a substantial or a motivating factor in the Board's decision to discharge her." (A-9). But inasmuch as the district court itself "found that Avery had carried her initial burden" of proving that an unconstitutional policy[5] was a motivat-

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[5] In this connection, the court of appeals held, on the basis of the Fifth Circuit's earlier decision in *Andrews v. Drew Municipal Separate School Dist.*, 507 F.2d 611 (1975), *cert. dismissed as im-*

ing factor in her discharge, the court of appeals explained that under the rule established in *Mt. Healthy* "the district court should have gone on to determine whether the [petitioners] had proved by a preponderance of the evidence that they would have discharged Avery even in the absence of her out of wedlock pregnancy." (*Ibid.*) Because the district court had entered judgment for petitioners without undertaking that essential inquiry, the court of appeals held that the district court's judgment must be vacated.

The court of appeals went on to state the following (A-10-11):

> Having concluded that the district court's application of the wrong framework of proof caused it to neglect an essential factual inquiry, our usual course would be to remand the case to the district court for that inquiry. Having thoroughly reviewed the record, however, we are convinced that the district court could not permissibly find that the appellees proved by a preponderance of the evidence that the Board would have discharged Avery even absent her out of wedlock pregnancy.
>
> * * * *
>
> The record includes no evidence whatever to permit that inference.
>
> * * * *

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providently granted, 425 U.S. 559 (1976), that respondent could not constitutionally be discharged on the basis of petitioners' policy of treating unwed parenthood as *per se* proof of immorality. (A-11-12). In the court of appeals, petitioners took issue with respondent's characterization of the facts concerning the operation of the unwed-parenthood policy, but did not contest the constitutional principles articulated in *Andrews*. (Brief for Appellees in *Avery v. Homewood City Board of Education, et al.*, 5th Cir. No. 80-7364, pp. 22-24.) The court of appeals' ruling on this constitutional issue is not among the questions raised by the petition for certiorari. Respondent also challenged her discharge on statutory grounds, but those grounds were not addressed by the courts below. See A-9, n. 2; A-11.

Since no evidence in the record supports the proposition that Avery would have been dismissed absent consideration of her out of wedlock pregnancy, we would set aside as clearly erroneous a finding by the district court that the appellees proved that proposition by a preponderance of the evidence. Fed.R.Civ. P. 52(a). Therefore, we find that the appellees did not carry their burden to show that they would have discharged Avery even absent her asserted immorality.[5]

[5] Although we do not customarily make such factual findings, our authority to do so on a record permitting only one factual inference is clear. *See, e.g., Grosso v. United States*, 390 U.S. 62, 71-72, 88 S.Ct. 709, 715, 19 L.Ed.2d 906 (1968); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170, 87 S.Ct. 927, 932, 17 L.Ed.2d 834 (1967); *Felder v. United States*, 543 F.2d 657, 671 (9th Cir. 1976).

Accordingly, the court of appeals remanded the case to the district court with instructions to "determine the relief to which [respondent] is entitled and to enter judgment accordingly." (A-12).

Petitioners thereupon filed a petition for rehearing and a suggestion of rehearing en banc, in which they advanced the arguments that they now advance in their petition for certiorari. The court of appeals requested a response to the petition for rehearing and, after respondent submitted her response, the court denied the petition. (A-13-14).

SUMMARY OF ARGUMENT

1. Because the district court found that an unconstitutional policy was a motivating factor in respondent's discharge, the court of appeals correctly held that in order to defeat respondent's claim to reinstatement with backpay the burden was on petitioners to "show[] by a preponderance of the evidence that they would have reached the same decision as to [respondent's termination] even in the absence of the [unconstitutional pol-

icy]." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). There is no merit to petitioners' contention that the court of appeals should have ignored the square holding of *Mt. Healthy* and should only have required them to "articulate" a "valid nondiscriminatory reason" for respondent's discharge. The cases cited by petitioners in support of that standard of proof deal only with the manner in which an employer may rebut a *presumption* that an unlawful motivation played a part in a discharge; they do not deal with the employer's burden of proof in a case such as this, where it has been found as *fact* that an unlawful motivation played a part in the discharge and the employer seeks to escape the obligation to reinstate the employee with backpay by showing that the employee would have been discharged for lawful reasons even in the absence of the unconstitutional considerations that motivated the discharge. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Service v. Aikens*, —— U.S. ——, 51 U.S.L.W. 4354 (April 4, 1983). Thus, the court of appeals was correct in adhering to the rule of *Mt. Healthy*, and that adherence presents no issue warranting review.

2. Having found that the district court failed to address the question whether petitioners had shown by a preponderance of the evidence that they would have discharged respondent in the absence of their unconstitutional policy, the court of appeals recognized that its "usual course would be to remand the case to the district court for that inquiry." But the court concluded that in this instance it could properly resolve the inquiry itself, because "no evidence in the record supports the proposition that Avery would have been dismissed absent consideration of her out of wedlock pregnancy, [and consequently the court of appeals would be required to] set aside as clearly erroneous a finding by the district court that [petitioners] proved that proposition by a preponderance of the evidence. Fed.R. Civ.P. 52

(a)." (A-10-11). In following that course the court of appeals simply applied the well-established rule that "where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*" *Pullman-Standard v. Swint*, —— U.S. ——, 102 S.Ct. 1781, 1792 (1982) (emphasis added). The application of that rule to the facts of this case was carefully considered by the court of appeals, not only when the case was initially heard but also when petitioners filed a petition for rehearing on the basis of *Swint*. Review by this Court of that fact-bound determination is not warranted.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT UNDER *MT. HEALTHY*, ONCE RESPONDENT PROVED THAT HER DISCHARGE WAS MOTIVATED BY A CONSTITUTIONALLY IMPERMISSIBLE CONSIDERATION, PETITIONERS WERE REQUIRED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT SHE WOULD HAVE BEEN DISCHARGED ON OTHER GROUNDS IN ANY EVENT.

In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), this Court squarely held that where a teacher has proved that a constitutionally impermissible consideration was a "substantial factor" in the decision of a public school board to terminate her, the teacher is entitled to reinstatement with backpay unless "the Board ha[s] shown by a preponderance of the evidence that it would have reached the same decision as to [the teacher's termination] even in the absence of the protected conduct." *Id.* at 287.

Despite that holding, and the district court's finding that respondent was in fact terminated at least in part on the basis of appellees' impermissible policy that equates an out of wedlock pregnancy with immorality,

petitioners insist that they should have been required in this case only to "articulate" a "valid nondiscriminatory reason" for respondent's termination, rather than to prove by a preponderance of the evidence that respondent would have been discharged even in the absence of petitioners' unconstitutional policy. Petition for Certiorari, pp. 24-29. In an attempt to justify such a departure from the rule that was unambiguously laid down in *Mt. Healthy*, petitioners rely on a line of decisions under Title VII of the Civil Rights Act of 1964, particularly *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). But *Burdine* and this Court's other Title VII decisions do not purport to overrule *Mt. Healthy*, and it is apparent that petitioners have simply missed the point of those decisions.

Mt. Healthy teaches that a "mixed-motive" discharge case involves two discrete inquiries. First, the plaintiff must prove that the discharge was based at least in part on an impermissible motivation (and thus, that a wrong occurred). As to that issue the burden of proof is on the plaintiff: "[i]nitially the burden [is] properly placed upon [plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." *Mt. Healthy*, 429 U.S. at 287. If the plaintiff meets that burden, a second inquiry, which is the focus of the present case, may commence: the defendant may attempt to prove that the plaintiff should not be reinstated with backpay despite the defendant's reliance on an unlawful factor in terminating the plaintiff, by "show[ing] by a preponderance of the evidence that it would have reached the same decision as to [the termination] even in the absence of the protected conduct." *Ibid.*

Assuming arguendo that the principles announced in the *Burdine* line of Title VII cases are likewise applicable

to constitutional cases, those principles pertain only to the *first* of the two *Mt. Healthy* inquiries: *Burdine* explains the "division of intermediate evidentiary burdens" that applies in a Title VII discriminatory treatment case where circumstantial evidence must be evaluated in order to resolve the question of "[whether] the defendant intentionally discriminated against the plaintiff" (450 U.S. at 253)—i.e., whether an impermissible motivation played a part in the employment decision and thus whether a wrong occurred. See also *United States Postal Service v. Aikens*, —— U.S. ——, 51 U.S.L.W. 4354 (April 4, 1983). Consistent with *Mt. Healthy's* treatment of this issue, *Burdine* teaches that the "burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253.[6] See also *Aikens, supra*, 51 U.S.L.W. at 4356.

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[6] It is in the course of discussing this issue that *Burdine* deals with an employer's burden to rebut a prima facie case of discrimination by producing evidence that articulates a legitimate reason for the employer's action. Nothing in the Court's analysis of that point casts any doubt on *Mt. Healthy*.

As the Court explained in *Burdine*, in a Title VII discriminatory treatment case the plaintiff must first establish a "prima facie case" by putting on evidence "which give[s] rise to an inference of unlawful discrimination." *Id.* at 253-254. The evidence that serves to make out such a prima facie case "in effect creates a presumption that the employer unlawfully discriminated against the employee," because it "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Ibid.*; see also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Teamsters v. United States*, 431 U.S. 324, 358 and n.44 (1977).

At that stage, "[t]he burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254. "[T]o satisfy this intermediate burden the employer need only produce admissible evidence which will allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Id.* at 257. The reason why the defendant

But *Burdine* and *Aikens* simply do not address the *second* question resolved in *Mt. Healthy*—whether, once a plaintiff has succeeded in proving that an unlawful factor played a part in an employment decision, the defendant has the burden of proving that the same decision would have been reached in any event.[7] Thus, nothing in *Burdine* and *Aikens* casts any doubt on the Court's holding in *Mt. Healthy*.

In sum, here, as in *Mt. Healthy* (and in contrast to *Burdine* and *Aikens*), respondent proved through direct evidence that an impermissible reason motivated the de-

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at this stage need only "articulate" a legitimate reason for his action is that the plaintiff has only established a *presumption* of unlawful conduct, and "[a] satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Id.* at 255 n.10. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.* at 255. See also *Aikens, supra*, 51 U.S.L.W. at 4355.

At the final stage in the sequence of proof, the plaintiff "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* at 256. See also *Aikens, supra*, 51 U.S.L.W. at 4356 and n.5. At this stage, the presumption that was raised by the prima facie case has simply "dropped from the case" and is of no further relevance in determining whether discrimination played a part in the employment decision. *Aikens, supra* at 4355.

[7] Although this Court has not addressed that specific question in the context of Title VII, the Court has strongly suggested that under Title VII, as in constitutional cases, once it is proved that the defendant's actions were motivated by unlawful considerations the burden shifts to the defendant to prove that the same employment decision would have been made even in the absence of discrimination. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-773 and n.32 (1976); *Teamsters v. United States*, 431 U.S. 324, 358-362 (1977). Since this is not a Title VII case, the application of the second *Mt. Healthy* inquiry in such a case is not at issue here.

cision to terminate her employment; and the district court so found. The burden which then lay with petitioners was not merely to rebut a *presumption* of illegality (as in *Burdine* and *Aikens*),[8] but to attempt to demonstrate that respondent should not be reinstated despite the *fact* of illegality, because of the lawful factors which allegedly also played some part in her discharge. On that issue, as the court of appeals recognized, *Mt. Healthy* squarely holds that petitioners had the burden not merely to "articulate" a reason for which respondent could lawfully have been discharged, but to prove by a preponderance of the evidence that she would in fact have been discharged even in the absence of the unconstitutional unwed-parents policy.

Because the court of appeals simply applied the precise holding of *Mt. Healthy*, and *Mt. Healthy* remains good law, this issue does not warrant review.

II. THE COURT OF APPEALS' CONCLUSION THAT THE RECORD COULD NOT SUPPORT A DETERMINATION THAT PETITIONERS HAD SUSTAINED THEIR BURDEN OF PROOF PRESENTS NO QUESTION WARRANTING REVIEW BY THIS COURT.

Because the district court failed to address the question whether respondent would have been discharged in the absence of petitioners' unlawful unwed-parent rule, the court of appeals recognized that its "usual course would be to remand the case to the district court for that inquiry." (A-10). But in this case, as the court of appeals noted, "[t]he record includes no evidence whatever to permit th[e] inference" that respondent would have been discharged merely for her non-compliance with the four-month-notice rule, absent petitioners' unlawful unwed-parent policy. (*Ibid.*) Consequently, the court of appeals would be constrained to "set aside as clearly erroneous a finding by the district court that [petitioners]

[8] See note 6 *supra*.

proved that proposition by a preponderance of the evidence. Fed.R.Civ.P. 52(a)." (A-11). For that reason, the court of appeals instructed the district court to enter judgment for respondent.

Petitioners contend that the court of appeals "disregard[ed] the 'clearly erroneous' standard of Rule 52(a), Fed.R.Civ.P." and "exceeded its appellate authority for review," contrary to this Court's decision in *Pullman-Standard v. Swint*, ——U.S. ——, 102 S.Ct. 1781 (1982). Petition for Certiorari, p. 9. But in fact, the court of appeals simply applied the well-established rule, reaffirmed in *Swint*, that "where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue*." 102 S.Ct. at 1792 (emphasis added). Thus, the court of appeals noted that although it "do[es] not customarily make . . . factual findings, [its] authority to do so on a record permitting only one factual inference is clear." (A-11, n.5).[9]

The court of appeals thus correctly stated the governing legal principles; and, as is apparent from a review of the record (see pp. 1-3 *supra*), the court of appeals correctly applied those principles in this case.[10] What is

[9] This case, therefore, does not present the error of law that was reversed by this Court in *Swint*. There, the Fifth Circuit proceeded on the basis of a rule fashioned by that court for Title VII cases, whereby the court of appeals viewed itself as free in all such cases to make an "independent determination," without regard to Rule 52, of the "ultimate fact" of discrimination. See 102 S.Ct. at 1788-1792. No such approach was followed by the court of appeals in this case.

[10] Indeed, at one point in their petition for certiorari, petitioners appear to acknowledge that they did not even *attempt* to satisfy their burden of proving that they would have discharged respondent in the absence of their unlawful policy; for petitioners seek to excuse that failure by asserting that they were not "given the opportunity to implement the requirements of *Mt. Healthy* at the trial," because respondent did not "raise[] the *Mt. Healthy* decision" at trial. Petition for Certiorari, p. 22. In this connection petitioners

more, such a fact-bound matter does not warrant review by this Court in any event.[11]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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quote *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), where this Court held that an employer who "did not attempt to prove in the district court that the decision not to rehire [a teacher] would have been made even absent [unlawful] consideration[s]" should be given an opportunity to make such a showing, because the case had been tried before *Mt. Healthy* was decided. Since *this* case was tried years *after Mt. Healthy* was decided, petitioners' attempt to compare their plight to that of the employer in *Givhan* is untenable.

Petitioners also repeatedly suggest that the court of appeals "ignored" the district court's findings of fact (petition for certiorari, pp. 10, 11), or that the court of appeals improperly set aside those findings as clearly erroneous (*id.*, pp. 13, 14, 20). Although petitioners are not altogether clear as to the finding of fact they have in mind, apparently petitioners contend that the district court found that respondent would have been discharged even in the absence of their unlawful policy. *Id.*, p. 14. But the district court made no such finding (see A-2-5), and the court of appeals carefully adhered to the findings that the district court *did* make (see A-7-10).

[11] Any suggestion that the case should be remanded for reconsideration in light of *Swint* is particularly inappropriate given the fact that the court of appeals has already had an opportunity to evaluate the case in light of *Swint*, because the matter was raised by the petition for rehearing.